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8 JASON SMITH,
9 Plaintiff,
10 v.
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12 K. SIRWET-BINNING, et al.,
13 Defendants.
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16 Case No. 20-05542 BLF (PR)
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**ORDER OF PARTIAL DISMISSAL
AND DISMISSAL WITH LEAVE TO
AMEND**

19 Plaintiff, a state inmate at the Correctional Training Facility (“CTF”) in Soledad,
20 filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against officers at
21 CTF. Dkt. No. 1. Plaintiff’s motion for leave to proceed *in forma pauperis* will be
22 addressed in a separate order.

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DISCUSSION

25 A. **Standard of Review**

26 A federal court must conduct a preliminary screening in any case in which a
27 prisoner seeks redress from a governmental entity or officer or employee of a
28 governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any
cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim

1 upon which relief may be granted or seek monetary relief from a defendant who is immune
2 from such relief. *See id.* § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
3 construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
5 elements: (1) that a right secured by the Constitution or laws of the United States was
6 violated, and (2) that the alleged violation was committed by a person acting under the
7 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff’s Claims**

9 Plaintiff claims that on January 26, 2018, he received a Rules Violation Report
10 (“RVR”) for “Refusing to Accept Assigned Housing-Delaying a Peace Officer.” Dkt. No.
11 at 8. On January 31, 2018, he appeared at a disciplinary hearing before Defendant Greer
12 who denied his request for witnesses to be present “for no legitimate penological reasons.”
13 *Id.* Plaintiff was found guilty and assessed 30 days loss of various privileges and 61 days
14 loss of good time credits. *Id.* at 9. Plaintiff appealed, and the RVR was reissued and
15 reheard. *Id.* at 10. Plaintiff appeared at a rehearing before Defendant White, who denied
16 witnesses and found Plaintiff guilty. Plaintiff again appealed, and was granted another
17 rehearing. Plaintiff appeared at a rehearing before Defendant Sirwet-Binning, who also
18 found Plaintiff guilty without granting him witnesses. Plaintiff again appealed, and
19 another hearing was granted. On October 8, 2019, the RVR was voided, the 61 days loss
20 of good time/work credits were restored, and Plaintiff was notified that no further
21 administrative actions would be taken on the RVR. *Id.* at 13. Plaintiff seeks declaratory
22 and injunctive relief as well as damages. *Id.* at 15-16.

23 Taking all the allegations as true, Plaintiff fails to state a claim for relief. Violation
24 of procedural due process rights requires only procedural correction and not a
25 reinstatement of the substantive right. *See Raditch v. United States*, 929 F.2d 478, 481 (9th
26 Cir. 1991). If the procedurally protected liberty interest of which the prisoner is deprived
27 during the disciplinary process is restored during the prison administrative appeal process,

1 the prisoner does not have a due process claim. *See Frank v. Schultz*, 808 F.3d 762, 763-
2 64 (9th Cir. 2015) (summary judgment properly granted to defendants on due process
3 claim where prisoner filed a successful administrative appeal which led to the removal of
4 the incident report from his file and the forfeited credits were restored). Here, Plaintiff's
5 allegations clearly indicate that any procedural error was corrected through the
6 administrative appeal process, and he ultimately did not lose any good time credits.
7 Accordingly, this due process claim should be dismissed for failure to state a claim.

8 Plaintiff also claims that his right to equal protection was violated because he was
9 denied his requested witnesses while other prisoners were afforded witnesses at their RVR
10 hearings. Dkt. No. 1 at 14. However, Plaintiff fails to state sufficient facts to state an
11 equal protection claim. When challenging his treatment with regard to other prisoners,
12 courts have held that in order to present an equal protection claim a prisoner must allege
13 that his treatment is invidiously dissimilar to that received by other inmates. *More v.*
14 *Farrier*, 984 F.2d 269, 271-72 (8th Cir. 1993) (absent evidence of invidious
15 discrimination, federal courts should defer to judgment of prison officials); *Timm v.*
16 *Gunter*, 917 F.2d 1093, 1099 (8th Cir. 1990) (same). The first step in determining whether
17 the inmate's equal protection rights were violated is to identify the relevant class of
18 prisoners to which he belongs. *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013).
19 The class must be comprised of similarly situated persons so that the factor motivating the
20 alleged discrimination can be identified. *Id.* at 1031 (affirming district court's grant of
21 defendants' motion for summary judgment because inmate failed to raise triable issue of
22 fact that he was treated differently than any other inmate whom the officers did not know
23 was entitled to a vegetarian meal). Here, Plaintiff makes no allegation with respect to what
24 class of prisoners he belongs and how the treatment he received was invidiously dissimilar
25 to that received by other inmates. Plaintiff shall be afforded one opportunity to file an
26 amended complaint to attempt to allege sufficient facts to state a cognizable equal
27 protection claim.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff's due process claim is **DISMISSED with prejudice** for failure to state a claim for which relief can be granted. *See* 28 U.S.C. § 1915A(b)(1),(2).

2. Plaintiff's equal protection claim is **DISMISSED with leave to amend**. Within **twenty-eight (28) days** of the date this order is filed, Plaintiff shall file an amended complaint to state sufficient facts to state an equal protection claim as described above. *See supra* at 3. The amended complaint must include the caption and civil case number used in this order, Case No. C 20-05542 BLF (PR), and the words "AMENDED COMPLAINT" on the first page. If using the court form complaint, Plaintiff must answer all the questions on the form in order for the action to proceed.

The amended complaint supersedes the original, the latter being treated thereafter as non-existent. *Ramirez v. Cty. Of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). Consequently, claims not included in an amended complaint are no longer claims and defendants not named in an amended complaint are no longer defendants. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.1992).

3. Failure to respond in accordance with this order in the time provided will result in the dismissal of this action without prejudice and without further notice to Plaintiff.

The Clerk shall include two copies of the court's complaint with a copy of this order to Plaintiff.

IT IS SO ORDERED.

Dated: January 6, 2021

Beth Labson Freeman
BETH LABSON FREEMAN
United States District Judge

Order of Partial Dismissal and Leave to Amend
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